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No. 94-70

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CITY OF LOS ANGELES,
and
MICHAEL SIRK,

Petitioners,

vs.

HENRY BRADFORD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT HENRY BRADFORD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Was it error for the jury to determine that a police officer's use of deadly force was unnecessary when part of the evidence on which the jury relied was that there were reasonable and available non-deadly alternatives, which evidence was received without objection, and other evidence indicated that the deadly force occurred while plaintiff was lying helpless and unarmed on the ground and that the defendant police officer maliciously used such force?

LIST OF PARTIES

Respondent Henry Bradford was plaintiff and appellee in the courts below. Petitioner Michael Sirk was a defendant and the appellant in the courts below. Daryl Gates and the City of Los Angeles were defendants in the trial court and, pursuant to stipulation filed August 11, 1992, were dismissed prior to the appeal.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CITY OF LOS ANGELES,
and
MICHAEL SIRK,

Petitioners,

vs.

HENRY BRADFORD,

Respondent.

Respondent Henry Bradford respectfully submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Memorandum decision of the Ninth Circuit, filed April 4, 1994, was not certified for publication. A copy of the decision is attached as the Appendix to the Petition. (References herein to the decision are to the Petition Appendix.)

JURISDICTION

As to Petitioner Sirk only, Respondent agrees with Petitioners' jurisdictional statement (Petition, p. 2). Petitioner City of Los Angeles was dismissed in the trial court before the appeal was taken.

STATUTORY PROVISION INVOLVED

United States Code, Title 42, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Statement of Facts

Plaintiff Henry Bradford sued Los Angeles Police Detective Michael Sirk under 42 U.S.C. § 1983, claiming that Detective Sirk used excessive force when he detained him on March 14, 1989. The jury trial commenced July 22, 1991.[1] On August 15, 1991, the jury returned a verdict in favor of Mr. Bradford and against Detective Sirk, awarding plaintiff $850,000.00 in compensatory damages and $40,000.00 in punitive damages. ERA 41.

Mr. Bradford's claim arose from a March 14, 1989 stakeout by Los Angeles Police Department ("LAPD") SIS detectives[2] of a ransom drop-point near the intersection of 64th and Flower Streets in South Central Los Angeles, where the detectives tried to detain several persons, including Mr. Bradford, but which instead resulted in severe injury to Mr. Bradford, one person shot dead, and the escape of one or more possible suspects. Mr. Bradford contended that SIS detective Sirk maliciously used excessive force when Sirk drove his car over Mr. Bradford as he lay helpless and unarmed on the ground. Although the particulars on how the collision between Sirk's car and Mr. Bradford occurred were disputed, it was undisputed that as a result of the collision Mr. Bradford suffered a severely comminuted fracture of the distal fibula and tibia, *i.e.*, his right leg just above the

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[1] Petitioners are simply wrong when they claim that jury trial "commenced on January 23, 1991." Petition, p. 4.

[2] "SIS" refers to Special Investigation Section and is comprised of detectives who have been involved in numerous controversial incidents, see, e.g., *Gomez v. Gates*, 804 F. Supp. 69, 70-71 (C.D. Cal. 1992).

ankle was crushed.[3] He sustained severe life-long injuries. (7/26/91 RT 25:13-26:10; 31:5-32:10; 27:17-18; 7/31/91 126:9-11; 134:12-135:5.)

Having been briefed on a kidnapping and ransom demand where victims' lives had been threatened, Detective Sirk was one of many officers in a stakeout whose function was to maintain a perimeter to cut-off possible escape routes. (7/25/91 RT 16:23-17:8; 23:5-24:3.) The plan did *not* include using a car to detain someone. (7/25/91 RT 27:17-20.) Sirk parked his car around a corner from the drop point and waited. Eventually, Sirk heard the point officer broadcast that a car with three or four occupants had stopped near the drop point, a man -- later identified as Henry Bradford -- got out of the passenger side, ran across the street and retrieved one of the two packages (one supposedly containing money, and the other supposedly containing cocaine), and then returned toward the car. (7/25/91 RT 38:10-25.) As Mr. Bradford was returning to the car, the point officer came out of his hiding spot and told him to freeze. Mr. Bradford threw the ransom package into the car and began running down the street and away from the car. (7/24/91 RT 116:25-117:19; 7/25/91 RT 29:2-30:1; 32:1-6; 34:11-16.)

When Sirk heard the point officer's broadcast, he turned the corner in his car and began driving down the street toward the drop point. (7/25/91 RT 30:21-31:1.) Sirk saw Mr. Bradford running down the street. (7/25/91 RT 34:11-35:4.) Sirk claimed when he pulled up behind Mr. Bradford, Sirk's partner (a passenger in Sirk's car) ordered Mr. Bradford to stop, but Mr. Bradford kept running. (7/25/91 RT 48:23-49:13.) Then, driving at

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[3] 7/31/91 Reporter's Transcript ("RT") 128:1-18.

about 15 mph, Sirk drove his car into Mr. Bradford from behind, hitting Mr. Bradford "hard" and causing him to roll up and onto the car's front hood, possibly touching the windshield. When Sirk stopped his car, Mr. Bradford slid forward, off the hood and onto the street. When Mr. Bradford hit the ground, Sirk claimed that Mr. Bradford got up and resumed running down the street. (7/25/91 49:16-24; 50:13-14; 51:17-18; 52:8-12; 53:8-25.) Sirk drove his car forward, passed Mr. Bradford, and turned onto the street curb in front of Mr. Bradford, in an effort to cut him off. (7/25/91 RT 57:6-25; 76:16-22.) At this point, according to Sirk, Mr. Bradford ran into the car's right front fender. (7/25/91 RT 57:16-25; 84:7-10.) Sirk claimed that this second impact threw Mr. Bradford backwards and that somehow Mr. Bradford injured his leg in this second impact. (7/25/91 RT 60:3-5; 7/26/91 RT 7:18-8:13.)

At about the same time Sirk drove his car up on the curb, a neighborhood resident, David Pace, first heard (and then saw) a car "burn rubber" causing him to look out the window of his house at the corner of 64th and Flower. (7/24/91 RT 5:17-6:24.) Mr. Pace saw Sirk's car jump the curb and hit Mr. Bradford, knocking him into the fence. (7/24/91 RT 6:21-25.) Mr. Pace could see that Mr. Bradford was hurt and that plain clothes officers were grabbing and pulling at him, trying to turn him over. Mr. Pace heard an officer, probably Detective Sirk,[4] say to Mr. Bradford, "Hey, nigger, where is the lady and the kid, where [is] the money . . . ." (7/24/91 RT 7:18-21; 10:18-

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[4] Since Detective Sirk, in his interrogatory answer, admitted interrogating Mr. Bradford as he lay on the ground after having been hit by the car (7/25/91 RT 64:19 - 65:2) the jury probably found that Sirk was the officer Mr. Pace heard verbally harassing Mr. Bradford.

23.)[5]

Plaintiff Bradford's police practices expert, Van Bogardus, testified that Sirk's use of the car to stop Mr. Bradford's flight violated generally accepted law enforcement standards. (7/26/91 RT 92:20-93:12.) Using the car to strike Mr. Bradford constituted deadly force and assuming Detective Sirk's version of the incident were true, Sirk's use of deadly force violated law enforcement standards for the use of deadly force. (7/26/91 RT 122:19-123:1; 141:22-142:1.) Sirk should have relied upon the perimeter which had been established to prevent escape. (7/26/91 RT 121:4-122:5; 124:16-125:12.) Alternatively, Sirk should have driven past Mr. Bradford and establish another perimeter. (7/26/91 RT 115:2-22.) Sirk did not object to Mr. Bogardus' testimony. (7/26/91 RT 80:17-126:10.) Nor did Sirk move to strike the testimony.

Plaintiff Bradford's accident reconstructionist expert, Rusty Haight, testified that Detective Sirk's version of the collision between his car and Mr. Bradford was physically impossible. Had Mr. Bradford run into the side of the car as Sirk claimed, Mr. Bradford's legs would have lifted off the ground and away from the right front tire -- a result inconsistent with Bradford's injuries (8/12/91 RT 25:5-18). Additionally, there was not enough distance for

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[5] Because Mr. Bradford's trial testimony on how the collision and his injury occurred was stricken (Appendix to Petition, p. A-6), Respondent does not rely upon it. Note, however, that the testimony of Dr. Shlens, *Detective Sirk's* medical expert, regarding what Mr. Bradford had told Dr. Shlens on how the injury occurred, was received without objection and was not part of the stricken testimony. 8/12/91 RT 132:6-11. Indeed, in closing argument Sirk's counsel even read to the jury Mr. Bradford's version of the collision as reflected in Dr. Shlens' report. 8/13/91 RT 6:18-24.

Detective Sirk to have executed the vehicle maneuvers he claimed he made in the distance the car traveled from Sirk's alleged first impact point to its ultimate resting point, *i.e.,* running down Mr. Bradford from behind, stopping the car, starting up, swerving to cut Bradford off and jumping the curb. (8/12/91 RT 23:3-24:18; 25:2-26:6.) Nor, according to Mr. Haight, was the damage to Sirk's car consistent with a person running into the car as Detective Sirk claimed. (8/12/91 RT 31:21-32:5.)

Mr. Haight concluded that there was but one collision which occurred when, while the car was jumping the curb, the car struck Mr. Bradford from behind on his buttocks, briefly carrying Mr. Bradford on the hood while the car moved a few feet from the curb and toward the sidewalk. From this single impact Mr. Bradford came off of the car and fell onto the ground. Then, while Mr. Bradford was on the ground with his right leg laying flat on the ground, Sirk's car drove forward and the right front tire ran over Mr. Bradford's right leg, just above the ankle, crushing it. (8/12/91 RT 32:22-33:17.)

A *defense* expert and an orthopedic surgeon, Dr. Shlens, testified that Mr. Bradford had told him he was injured when a car jumped the curb and struck him, "knock[ing him] down to the sidewalk," and that after he was knocked down by the car, he was "either sitting on the sidewalk or lying on his back when the car came forward and ran over his leg." (7/31/91 RT 140:25-141:5; 142:7-15.[6]) Dr. Shlens admitted that Mr. Bradford's leg injuries were consistent with the car running over Mr. Bradford's

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[6] Because defense counsel initially elicited this testimony from Dr. Shlens to show what Mr. Bradford had told Dr. Shlens, this testimony was not part of the stricken testimony. Nor did defendant move to strike Dr. Shlens' testimony about what Mr. Bradford had told him regarding how he was injured.

leg as it lay flat on the ground, *i.e.*, consistent with Mr. Bradford's version (as told to Dr. Shlens) and the version described by Mr. Haight. (7/31/91 RT 133:18-134:3.) Dr. Shlens also testified that Mr. Bradford's injuries were *not* sustained from a collision as described by Detective Sirk. First, had Sirk's car struck Mr. Bradford from behind at about 15 mph as Sirk claimed, Dr. Shlens would expect the medical records to reflect physical injuries consistent with that impact. The medical records, though, reflected no such injuries. (7/31/91 RT 127:7-16; 130:5-131:2.) Second, Dr. Shlens opined that, given the severity of Mr. Bradford's leg injury, it was impossible for Mr. Bradford to get up and resume running as Sirk and his partner claimed he did. (7/31/91 RT 127:17-19.)

Joseph Callanan, Detective Sirk's police practices expert, testified that if the collision between Sirk's car and Mr. Bradford occurred as described by Sirk -- *i.e.*, that there were two collisions between the car and Mr. Bradford, and on the second collision, Mr. Bradford ran into the right front fender -- then using the car to stop Mr. Bradford's flight was appropriate. (7/31/91 RT 44:11-46:16-24.) However, Mr. Callanan admitted that if Sirk drove the car over Mr. Bradford's right leg as described by Mr. Haight and as Mr. Bradford described it to Dr. Shlens -- the car first knocked Mr. Bradford to the ground and then, with Mr. Bradford sitting or laying on the ground and his right leg laying flat, Sirk drove the car forward over Bradford's leg -- that would constitute unnecessary and excessive force. (7/31/91 RT 87:8-18.)

B. Petitioner's Misstatements of Facts

At this stage, all reasonable inferences are drawn in support of the jury's verdict. Thus, all factual conflicts are resolved in favor of Mr. Bradford, the prevailing party. Rule 50, Federal Rules of Civil Procedure; *Brady v.*

Southern Railroad, 320 U.S. 476, 479-80 (1943). Petitioner violates the rule in numerous respects. We note that petitioner did not provide record citations for his version of the facts, which is not surprising since much of his factual description is not borne out by the record.

Petitioner's assertion that Sirk testified he "could not rely on the perimeter" because it had been "blown" by the removal of a helicopter and vehicles (Petition, pp. 6-7) is false. While Sirk obviously abandoned the plan, he admitted that the perimeter had not been compromised by the removal of officers or vehicles, that the perimeter was established, manned by police officers, for the purpose of preventing Mr. Bradford's escape, which Sirk knew he could and should rely upon. (7/25/91 RT 25:1-10; 25:21-24; 42:15-22; 107:7-11.) Sirk's commanding officer (Dennis Conte) admitted that the officers had set up a perimeter surrounding the ransom drop point to stop any person who might attempt to escape. (7/24/91 RT 53:4-12.) Sirk knew this. (7/25/91 RT 42:15-22; 107:7-11.)

Petitioner tries to rewrite the record by claiming that Mr. Bradford's and Detective Sirk's respective versions of the collision differed only "somewhat" (Petition, p. 8), thereby implying that the differences were inconsequential. In fact, the differences were substantial and critical. Under Detective Sirk's version, there were two collisions, and in the second Mr. Bradford ran into the car, thereby causing his injury. (7/25/91 RT 57:6-25; 76:16-22; 84:7-10; 89:23-25 [Sirk's testimony]; 7/25/91 RT 124:18-125:7; 126:17-21; 127:9-11; 128:21-129:2 [testimony of Sirk's partner].) Under Mr. Bradford's version (as reflected in what he told Dr. Shlens and the testimony of Mr. Haight, the accident reconstructionist), there was only one collision, and after that collision Mr. Bradford was laying or sitting on the ground, his leg laying flat, when Sirk drove the car forward over his leg, crushing his lower

leg just above the ankle. Even Callanan, *Sirk's* police practices expert, admitted that under Mr. Bradford's version,[7] the force was excessive. (7/31/91 RT 44:11-46:16-24; 87:8-18.)

The claim that Sirk was "unsure whether the vehicle collided with Bradford or whether Bradford ran into the vehicle" (Petition, p. 7) is also false. Sirk testified that Mr. Bradford "ran into the car literally," that "Mr. Bradford struck my car," that "he did run into the fender," that is, the "right front fender just in front of the wheel." (7/25/91 RT 57:18-25; 84:7-10.) It was significant that Sirk claimed Mr. Bradford ran into the car. Plaintiff's accident reconstructionist (Mr. Haight) testified that based upon the physical evidence, Sirk's claim that Mr. Bradford ran into the car was physically impossible. Thus, the jury had ample basis to conclude that Sirk intentionally lied at trial, and to draw inferences from that conclusion regarding Sirk's actions in running down Mr. Bradford.

C. Petitioner's Omission of Facts

Petitioner does not acknowledge David Pace, the neighborhood resident who witnessed the collision between Mr. Bradford and Sirk's car, and Dr. Shlens, the defense expert and orthopedic surgeon who examined Mr. Bradford and the medical records. Their testimony was significant because both supported inferences showing that Sirk lied in describing the collision between his car and Mr. Bradford, and that Sirk had acted maliciously in using excessive force. Dr. Shlens' testimony showed that Mr. Bradford's physical injuries were inconsistent with Sirk's version while consistent with Mr. Bradford's version. Mr.

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[7] "Mr. Bradford's version" refers to the version described by Mr. Haight and reflected in Mr. Bradford's statement to Dr. Shlens. It does not include Mr. Bradford's stricken trial testimony.

Pace testified that within moments of the car running over Mr. Bradford's leg, a police officer, probably Sirk, was abusing Mr. Bradford and calling him a "nigger."

While it is correct that Mr. Bradford's police practices expert testified -- without any objection by Sirk -- that given the availability of reasonable non-lethal alternatives, Sirk's use of the car to strike Mr. Bradford was unreasonable under accepted law enforcement standards, Petitioner carefully avoids mentioning that his own police practices expert (Callanan) agreed that "deadly force should not be exercised if there are reasonable alternatives available." (7/31/91 RT 56:11-14.) *Compare* discussion of Mr. Bogardus' testimony (Petition, p. 8, second paragraph) *with* discussion of Mr. Callanan's testimony (Petition, p. 9, first full paragraph). Nor does Petitioner acknowledge his own expert's testimony that under LAPD policy, " '[d]eadly force shall only be exercised when all reasonable alternatives have been exhausted or appear impractical.' " (7/31/91 RT 58:1-15.) Additionally, Petitioner fails to mention that at trial, Sirk stipulated to the admission of the LAPD written policy which stated that deadly force was limited to situations where "reasonable alternatives have been exhausted or appear impractical." (Trial Exhibit 85, see 8/1/91 RT 44:25-45:7.)

Finally, Petitioner omits mentioning that Sirk, in denying that he intended to hit Mr. Bradford the "second time," claimed that he was trying to "use an *alternative* to using [the] car to hit [Mr. Bradford]." (7/25/91 RT 89:13-22.) According to Sirk, that "alternative" was driving the car ahead of Mr. Bradford and then turning onto the sidewalk to block Mr. Bradford's escape route, thereby

containing him.[8] (7/25/91 RT 57:6-15; 76:16-22.) While the jury was entitled to conclude that Detective Sirk fabricated this whole second collision to cover up his conduct, nonetheless it is an implicit admission by Detective Sirk that a non-lethal alternative existed and should have been used.

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[8] According to Sirk, the alternative did not work because "Mr. Bradford ran into [the] car." 7/25/91 RT 89:20-25.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED WERE NOT RAISED BELOW AND WERE WAIVED

Not once did Petitioner object to any testimony or evidence that Detective Sirk had reasonably available non-lethal alternatives to running down Mr. Bradford with his car. Sirk raised no objections to any questioning of Bogardus regarding Sirk's reasonably available non-lethal alternatives. Sirk did not move to strike the testimony and made no complaint of error in the trial court. Sirk's *only* response to the evidence that Sirk had available non-lethal alternatives was to (1) claim he had tried to use one such alternative but it failed when Bradford allegedly ran into the car (7/25/91 RT 89:20-25), and (2) argue "[t]here was no other reasonable way at this time to stop Mr. Bradford." (8/13/91 RT 11:23-24 [closing argument of Sirk's counsel].)

Petitioner cannot now complain that the jury should have disregarded evidence of reasonably available non-lethal alternatives in determining reasonableness. This Court will not decide questions not raised or litigated in the lower courts. *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957); *Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). In *Springfield*, the Court dismissed the writ of certiorari as improvidently granted because, even though the jury instruction at issue was considered by the court of appeal, petitioner raised no objection to the instruction in the trial court and indeed, had requested that it be given. 480 U.S. at 259. So too here. At trial, Sirk did not object to the evidence; rather, by not objecting and instead stipulating to the admission of the LAPD policy statement barring

deadly force where non-lethal alternatives were available,[9] Sirk agreed that such evidence was relevant and properly before the jury. Nor did Sirk object to the jury instructions on the use of force standard.

For similar reasons, the Court should not consider Petitioner's question regarding the sufficiency of plaintiff's expert testimony to show that Sirk had reasonably available non-lethal alternatives. (Petition, Question No. 3; pp. 26-29.) Again, rather than object to Respondent's expert's testimony, Petitioner simply called his own "paid" expert to testify that Sirk acted reasonably (under Sirk's version).

II. ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED

Both sides agreed that, when Detective Sirk used the car to run down Mr. Bradford, it would be unjustified "if there [were] reasonable alternatives available." (7/31/91 RT 56:11-14 [testimony of Petitioner's expert].) Both sides agreed that, if Mr. Bradford was sitting on the ground and the car ran over his leg, then Sirk used excessive force. (7/31/91 RT 87:8-18 [testimony of Petitioner's expert].) Among the disputed issues were, did Sirk have any reasonably available non-lethal alternatives (Sirk claimed he did not; Bradford claimed he did), and did Mr. Bradford run into Sirk's car as Sirk claimed, or did Sirk drive the car over Mr. Bradford's leg, as he sat on the ground, helpless and unarmed? From the award of $40,000 in punitive damages, one must infer that the jury disbelieved Sirk's account of what happened.

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[9] Trial Exhibit 85, see 8/1/91 RT 44:25-45:7, and 7/31/91 RT 58:1-15 (testimony of Sirk's police practices expert).

Petitioner now asks that this Court analyze the particular facts on the disputed factual issues. In particular, Petitioner wants the Court to re-weigh the evidence on non-lethal alternatives, and reverse the district court's judgment on factual grounds even though the district court received the concurrence of the court of appeal. Yet this Court has long held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver v. Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949), and cases cited therein; *see also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). There was "no obvious and exceptional" error. Both sides put the disputed factual issues before the jury. As explained in Part III(A), *infra*, the question of whether lethal force was necessary or unnecessary is a classic issue of fact. *E.g., Brower v. County of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989). Here, the jury ruled in plaintiff's favor; the trial court upheld that finding; the court of appeal concurred on the ground that it was a question of fact for the jury. Review by this Court is therefore inappropriate.

While the Ninth Circuit decision stated that the jury could conclude that Detective Sirk's use of a car as a weapon was unnecessary because he had more reasonable alternatives (Appendix to Petition at p. A-8), this case does not rest on that issue. Although the decision does not discuss it, there was also substantial evidence from which the jury could conclude that Sirk intentionally and callously ran over Bradford while he was lying on the ground, as we have already noted. And the jury could have concluded that Sirk lied in his description of events and drawn adverse conclusion from that false testimony. As Judge Kozinski said in *Scott v. Henrich*, * F.3 * (9th Cir. 1994), 94 Daily Journal D.A.R. 12739 (filed September 12, 1994), a case Petitioner cites, part of the assessment of the evidence on which a jury could rely is

"whether the officer's story is internally consistent and consistent with other known facts," and whether the "circumstantial evidence . . ., if believed, would tend to discredit the police officer's story." *Id.* at 12740. Although the Ninth Circuit panel apparently did not think it necessary to address this evidence, it is clearly an independent basis in evidence for the jury's decision. Thus, in this case, whether the legal standard of necessity encompasses more reasonable alternatives makes no difference because the jury had other substantial evidence from which it could have found in plaintiff's favor.

III. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

A. The Decision Below Follows An Unbroken Line Of Authority

In *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), this Court held that lethal force is justified only if *such force is necessary* to prevent escape. Since the dictionary definition of necessary is that it was required, the issue of whether there are other reasonable alternatives is inherent in the concept of necessity. Thus, the Courts of Appeals consistently consider whether reasonable alternatives to deadly force are available as part of their assessment of whether the officer's conduct was objectively reasonable under the Fourth Amendment. See discussion in Part III(B), *infra*. Indeed, on his Petition (just as he did in the trial court) Sirk seeks to justify his use of force as reasonable by claiming that he had no reasonable alternative. Petition, pp. 6-7 (Sirk falsely claims that he could not rely upon the perimeter.)

The Ninth Circuit is no different. In *Brower v. County of Inyo*, 884 F.2d 1316 (9th Cir. 1989), on remand from this Court, the Ninth Circuit held it reversible error

to dismiss a complaint charging excessive force because, even assuming the suspect posed the significant threat as defined by *Tennessee v. Garner*, *supra*, "there remains the question whether such force was *necessary* to prevent the escape. . . . The necessity inquiry is a factual one: did a reasonable non-deadly alternative exist for apprehending the suspect?" 884 F.2d at 1317-18 [emphasis added].). In *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992), in reversing summary judgment in an excessive force case in favor of the officer, the Ninth Circuit held that the officer's use of force may be unreasonable because of "alternative courses of action." 958 F.2d at 887. Most recently, in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), the Ninth Circuit recognized that "alternative methods of capturing or subduing a suspect may be a factor to consider," 27 F.3d at 1440 n.5, and that the existence of such alternatives may establish a constitutional violation. 27 F.3d at 1445-46.

B. The Allegedly Conflicting Decisions Are Not In Conflict

Petitioner grossly distorts *Illinois v. Lafayette*, 462 U.S. 640 (1983). That decision merely decided that, where a search of a purse occurred, it did not matter that protection of the public or the arrestee's property could have been achieved by less intrusive means. It did not purport to state a "generally accepted rule" (Petition, p. 17) that the reasonableness of all Fourth Amendment seizures has nothing to do with the availability of less intrusive means of accomplishing the governmental objective. *Illinois v. Lafayette* involved the inventory of a purse during a routine booking, not the use of lethal force. The Court rejected the argument that the purse could have easily been secured by sealing it within a plastic bag or box and placing it in a secured locker, 462 U.S. 647, because "it would be unreasonable to expect police

officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit," 462 U.S. 648, for " '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront,' " *quoting New York v. Belton*, 453 U.S. 454 (1981). The decision whether to use lethal force involves weightier issues than the decision whether to inventory a purse or seal it in a plastic bag. Whether a person lives or dies is not a "subtle distinction." Two years after the decision in *Illinois v. Lafayette*, this Court in *Tennessee v. Garner*, *supra*, struck the balance between "the social and individual interests" officers confront when faced with the opportunity to use lethal force. The "single familiar standard" the Court wisely adopted is that deadly force may be used only where it is necessary. Nothing in *Illinois v. Lafayette* is contrary to *Garner*, which was decided after *Lafayette*.

Although petitioner claims that *Scott v. Henrich*, * F.3 * (9th Cir. 1994), 94 Daily Journal D.A.R. 12739 (filed September 12, 1994) contradicts the decision below and other Ninth Circuit decisions, he seriously misreads that case. The language he cites from the opinion is addressing whether the officers had to consider a less intrusive alternative to knocking on Scott's door while armed and announcing themselves as police officers when "an armed man who, they are told, recently fired shots and is acting 'crazy' lurks inside." The court found that the officers' conduct in so doing was reasonable, and no less intrusive alternatives had to be considered before knocking. When the door opened, Scott was standing with a gun pointed at the officers, who then fired. There was no contention by Scott that there was another alternative at that point. Scott's heirs argued that there was evidence

contradicting the officers' version, but the court disagreed.

The Ninth Circuit held that the shooting was objectively reasonable under *Garner* -- at the point the officers saw decedent's gun, they had no reasonable choice other than to use lethal force to protect themselves from an immediate threat to their lives. The Ninth Circuit rejected the argument that the shooting was unnecessary because the officers violated department regulations by approaching decedent's home. The relevant inquiry was at the point the officers fired their guns, and at that time the officers were faced with an immediate threat of being shot. Indeed, the *Scott* dissent implicitly conceded that, if the inquiry were limited to when the officers seized decedent (shot him), then they did not violate the *Garner* lethal force rule.

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992) did not, as Petitioner argues (Petition, p. 19), "consider[] and reject[]" "the question of whether the existence of non-deadly alternative vitiated the reasonableness of a police officer's use of deadly force." To the contrary, it was the absence of reasonable alternatives that the officer had which dictated the conclusion. In *Smith*, the decedent tried to escape from the police in a "wild chase at speeds in excess of ninety miles per hour." 954 F.2d at 344. At one point, the decedent "backed up his car, then sped forward and crashed in Officer Schulcz's car." 954 F.2d at 344. After the decedent "backed up again and zoomed around the police car, smashing into the fence and gate as he did so," 954 F.2d at 344, the decedent "was undoubtedly going to escape from Officer Schulcz, if not the entire police force," 954 F.2d at 347, and "Officer Schulcz had to decide whether to allow his suspect to escape." 954 F.2d at 347. The circuit court agreed with the district court that it was not unreasonable for Officer Schulcz to believe that if the decedent " 'continued this

escape attempt, he posed a significant threat of physical injury to numerous others' " 954 F.2d at 346, including a "a major threat to the officers manning the roadblock [because] a car can be a deadly weapon," and the decedent "had proven he would do almost anything to avoid capture." 954 F.2d at 347. The court specifically considered whether there were reasonable alternatives, finding that, although there was a roadblock, the officer could reasonably conclude "Smith could escape [it] . . . , as he had escaped several times previously." *Id.* As can be seen from these facts, the decedent posed an immediate threat of death or great bodily injury to anyone he might run into in his speeding car. Given the obvious absence of reasonable non-deadly alternatives, the Sixth Circuit upheld the conclusion that the shooting was reasonable because it was "necessary." 954 F.2d at 347, 348.

Petitioner completely distorts *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) (*en banc*). In that case, a truck was fleeing the police. The truck forced over 100 cars off the road while the police were in pursuit. The police tried various measures to stop the car (including a rolling roadblock, a stationary roadblock, and shooting at the car's tires) but none of their efforts succeeded. The defendant officer then decided to "use deadly force based on Cole's demonstrated lack of concern for other travellers and for the officers themselves." 993 F.3d at 1331. He shot at the truck, killing the driver. The court observed, among other things, that the officer "knew further than all other attempted means to stop the truck . . . had been unsuccessful." *Id.* at 1333. The court's later comment that "it could be argued" the use of force was not "the most prudent course of conduct as judged by 20/20 hindsight vision" arises in a context in which other reasonable alternatives had been exhausted. *Id.* at 1334. The comment is obviously intended to communicate that

at that point it was reasonable to conclude there was no other alternative.

In *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993), an officer shot a fleeing felony suspect, who was reported to have committed an armed assault and to be armed with a knife. The court stated that the abstract "possibility" that another officer might have apprehended the suspect did not render the officer's actions unreasonable. 991 F.2d at 440. The court obviously concluded that there were no reasonable alternatives available to prevent escape, and speculation about the mere possibility of other means was not sufficient to defeat a determination of necessity. (This should be contrasted to the situation here, in which the evidence established specific alternatives which were at hand and entirely feasible.)

Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988), is not in conflict with the decision in this case or *Garner's* "necessity" requirement. The opinion does not indicate that Ford claimed that the shooting was unnecessary to prevent his escape, which is understandable given the facts. Ford robbed a bank, apparently at gunpoint, fled, ignored repeated warnings to stop, and the pursuing officer fired at him. 855 F.2d at 1272. Ford almost did escape because, after the shots, he turned onto another street and was not captured until a short time later. 855 F.2d at 1272. Ford's argument appears to have been that the officer did not have probable cause to believe he was armed and dangerous because he never actually saw a gun in his hand, 855 F.2d at 1272, and that the officer never gave any warnings since Ford never heard any warning. 855 F.2d at 1276. The Seventh Circuit rejected both arguments finding that, although the officer did not observe a weapon, the uncontroverted evidence showed he "reasonably believed that the suspect had committed a felony involving the threat of deadly force, was armed with

a deadly weapon, and was likely to pose a danger of serious harm to others if not immediately apprehended. 855 F.2d at 1275.

Only in the most superficial sense can Petitioner argue (Petition, p. 24) that *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), "includes no discussion of the 'necessity' requirement of *Garner*." The decision turned on necessity. The decedent had just led the officers on a high speed chase after a robbery of a convenience store. 926 F.2d at 495. The officer ordered the decedent, whom he believed to have been involved in another armed robbery a few months earlier, 926 F.2d 496, to raise his hands, but decedent "repeatedly reached down in defiance of Anderson's orders . . . , below Anderson's sight line," 926 F.2d at 500-01, leading Anderson to strongly believe decedent "had picked up a gun and was going to shoot me as soon as he raised his hands up above the closed door." 926 F.2d at 496. "Anderson was ten feet away from Crawford and feared he would be shot before having time to react." *Id.* The plaintiff presented no evidence to contradict the officer's testimony.[10] The court concluded that "[u]nder these circumstances, a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that Crawford had retrieved a gun and was about to shoot." 926 F.2d at 501. Anderson was faced with a situation where "another warning could (it appeared at the time) cost the life of Anderson or another officer."

Petitioner's argument (Petition, p. 24) that *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992) lacks a "discussion of 'necessity' " is similarly meritless. Like in

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[10] The plaintiff did not oppose the summary judgment motion with any admissible evidence. 926 F.2d at 499.

Reese v. Anderson, the court's decision turned on "necessity." Officer Lowery "was *forced* to shoot Fraire in self-defense because Fraire was attempting to run Lowrey down with the pickup." 957 F.2d at 1274 (emphasis added). An eye-witness said "[t]he truck was heading right toward the detective and it looked like the driver of the truck was trying to run over the detective with the truck. . . . The truck was going to run right over the detective if the detective didn't do something and I don't know if the detective would have had time to even jump out of the way or not because the truck was going so fast and was so close to hitting the detective." 957 F.2d at 1271.

Contrary to petitioner's argument (Petition, p. 25), *Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987), did not "virtually dismiss[] the plaintiff's contention that alternative methods to the use of deadly force were available for apprehending her." *Ryder*, like this case, turned on the a *jury's* evaluation of the necessity of an officer's use of lethal force. There, unlike here, the jury found for the police officer, and all reasonable inferences were to be drawn in the officer's favor. There was, as here, conflicting evidence on whether, "absent the use of deadly force, the suspect would have escaped." 814 F.2d 1423. The defendants "testified that it was unreasonable to continue to pursue the suspect around the side of the building into a darkened area because he believed the suspect was armed and his life would be in danger." 814 F.2d at 1423. In addition, defendants' two expert witnesses also testified that it was not reasonable "to allow the suspect to escape with the thought that other officers in the area in vehicles might capture that person," and that he did not know "what else he could have done other than fire that shot . . . ." *Id.* Since there was evidence which, if believed, supported the jury's determination that the use of lethal force was necessary, the Tenth Circuit

held "there was sufficient evidence to support the jury's verdict that the use of deadly force was necessary to prevent Ryder's escape." 814 F.2d at 1423.

In reviewing these cases, certain points become clear. In applying *Garner*, the appellate courts have considered the existence of reasonable alternatives to deadly force as part of the overall inquiry into whether the officer's conduct was objectively reasonable. They have assessed reasonableness by looking at the overall situation which has included an inquiry into reasonable alternatives. Where the facts permitted different conclusions, the issue was for the trier of fact. The mere possibility of alternatives was not sufficient to defeat the officer's position, but the existence of reasonable alternatives is part of the overall determination of reasonableness. Although at times somewhat different phraseology issued, the cases petitioner cited are generally consistent and reveal a common thread. Thus, there is no conflict as petitioner claims.

IV. THE REQUIREMENT OF NECESSITY IN THE USE OF DEADLY FORCE IS WELL ESTABLISHED AND FUNDAMENTAL TO OUR SYSTEM OF JUSTICE.

The inquiry into necessity and the availability of less-injurious alternatives is the same because the concepts are inseparable. That which is necessary means alternatives are unavailable; that which is unnecessary means alternatives are available. In his Question Nos. 1 and 2, particularly Question No. 2, in effect Petitioner wants the element of "necessity" eliminated. Petitioner's position would divorce the concept of necessity from the existence of reasonable alternatives which would have allowed the seizure by equally effective, but less-injurious means. Petitioner's position runs contrary to an unchallenged line of authority dating back to the last

century. If adopted, once the police suspect a person of committing a life-threatening crime, the police may execute him. While Petitioner would undoubtedly deny this, the logical consequence of his position is that, if a suspect is dangerous, then he may be shot or otherwise the object of deadly force, no questions asked.

Even before *Garner*, the law did not permit deadly force where less-injurious alternatives were available. Under common law, deadly force, although used against a felon, was justified *only if* there were " 'no other way the escaping felon can be taken.' " Conversely, " 'if he may be taken in any case without [using deadly force],' " then deadly force was not justified. *Lamina v. State*, 46 Neb. 236, 64 N.W. 956, 957 (1895). The actor must " 'reasonably believe[] that the arrest cannot otherwise be effected.' " *Martyn v. Donlin*, 151 Conn. 402, 198 A.2d 700, 706 (1964) (*quoting* RESTATEMENT, TORTS § 131(c)). *See also Reese v. City of Seattle*, 81 Wash.2d 374, 503 P.2d 64, 71 (1972) (Washington Supreme Court "emphasize[s]" that deadly force may "be resorted to by an officer only when all other reasonable efforts to apprehend a person fleeing from a lawful arrest have failed" [emphasis deleted].); *Murphy v. Murry*, 74 Cal. App. 726, 731, 241 P. 938 (1925) (same). Nearly 30 years ago the President's Commission on Law Enforcement made the same point: "Officers should not be permitted to [use deadly force] when lesser force could be used [or] when the officer believes that the suspect can be apprehended reasonably soon thereafter without the use of deadly force." THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 189 (1967). Even the Tennessee law challenged in *Garner* limited deadly force to felons for whom " 'no lesser means of apprehension reasonably appears available.' " *Garner v. Memphis Police Dept.*, 710 F.2d 240, 246 (6th Cir. 1983) (*quoting* brief of Tennessee

Attorney General), *aff'd sub nom. Tennessee v. Garner*, 471 U.S. 1 (1985).

Thus, *Garner* left unchanged the rule that deadly force was not justified where it was unnecessary. Instead, *Garner* modified the common law by requiring that the suspect pose a threat of serious physical injury or death in order for deadly force to be used. Whereas at common law mere felony status alone and necessity were sufficient to justify deadly force, after *Garner* there must exist a credible threat of serious physical injury or death and necessity.

Here, there was substantial evidence showing that it was not necessary for Sirk to drive the car over Mr. Bradford's leg because Sirk had reasonably available less-injurious means of restraining Mr. Bradford. Bradford was already on the ground and stopped. Getting out of the car and pointing the gun at Bradford would have been sufficient. Additionally, Sirk could have driven ahead of Mr. Bradford and blocked his flight path, or Sirk could have relied upon the perimeter which he knew existed for the very purpose of stopping Bradford's possible flight. Appendix to Petition, pp. A-8, A-9. Against this evidence, Sirk prevails only if one rejects more than 100 years of decisional law reflected in *Garner's* observation that deadly force was not justified if unnecessary to effect the seizure.

It is, of course, not the function of the police to be judge, jury and executioner. But under Petitioner's logic, shooting Mr. Bradford dead at the point he lay on the ground would have been justified because there is no requirement that deadly force be necessary.

CONCLUSION

At the trial, Petitioner agreed that the jury could consider, in deciding if Sirk used excessive force, whether Sirk had reasonable non-lethal alternatives to running over Mr. Bradford. Now, after the jury found that Sirk's actions were unnecessary and unreasonable, a finding upheld by the trial court and court of appeal, Petitioner wants to change the rules and eliminate *Garner's* requirement that lethal force be "necessary." No court has argued in favor of such a radical change or that lethal force can be justified even when unnecessary. Therefore, the Petition for a Writ of Certiorari should be denied.

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